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Supreme Court, U.S.
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No. 08-224 AUG 18 2008

OFFICE OF THE CLERK

In the Supreme Court of the United States

DWAIN LEE KIRKLAND,

Petitioner,

v.

CHRISTOPHER K. TAMPLIN
AND KELLEY TAMPLIN et. al,

Respondents.

On Petition for Writ of Certiorari
To the Superior Court of Madison County Georgia

PETITION FOR WRIT OF CERTIORARI

Dwain Lee Kirkland
Pro se
P.O.B. 773
Hull, GA. 30646
706.788.3158

QUESTIONS PRESENTED

1. Does it violate the Due Process clause of the 14th Amendment for a trial court to hear, grant and issue a leviable *fieri fascias*, pursuant to an OCGA 9-15-14 motion for attorney's fees and costs--based on the supposition that a Plaintiff's legal positions are completely lacking in substance as to both law and fact--while the original body of the case has not yet been heard or denied certiorari by The Supreme Court of The United States.

2. Does any part of the way in which the state of Georgia handles the assessment of attorney's fees and costs, and the subsequent discretionary only appeal, pursuant to OCGA 9-15-14, violate The Constitution of the United States, or any of its amendments, more specifically the 5th, 7th and 14th amendments.

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Constitutional and Statutory Provisions:

U.S. Const. art. VI, cl. 2
U.S. Const. Amendment V
U.S. Const. Amendment VII
U.S. Const. Amendment XIV
O.C.G.A. 9-5-14

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Other Authorities:

None

OPINIONS BELOW

A Findings of Fact and Conclusions of Law pursuant to OCGA 9-15-14 was prepared by Defendants' counsel, signed by the judge, and entered in The Superior Court of Madison County Georgia on December 10th, 2007 (App. Infra, 4a).

A 10 page written opinion on the main body of Case #A07A1225 was entered by The Court of Appeals of Georgia on April 25th, 2007 (App. Infra, 14a).

A one-page, one-line order granting defendant's motion for summary judgment on Case #05-MV-977-H was entered by The Superior Court of Madison County Georgia on December 28th, 2006 (App. Infra, 23a).

Writs of certiorari, on both the main body of this case and this appeal, were denied by The Supreme Court of Georgia, last being Case #S08C0965 denied May 19th, 2008 (App., infra, 1a).

A writ of certiorari on the main body of this case #07-1071 was denied by this Court on March 31st, 2008 (App., infra, 2a).

JURISDICTION

The state court of last resort was the Supreme Court of Georgia. Order denying a writ of certiorari Case #S08C0965 was entered May 19th, 2008. This Court's jurisdiction is invoked under **28 USCS § 1257. State courts; certiorari.** Relevant part: "(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court by writ of certiorari where...any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of...the United States."

(June 25, 1948. ch 646, § 1, 62 Stat. 929; July 29, 1970, P. L. 91-358, Title I, Part D, Subpart 2, § 172(a)(1), 84 Stat.

590; June 27, 1988, P. L. 100-352, § 3, 102 Stat. 662.)"

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Clause 2 of the U.S. Constitution, the Supremacy clause, relevant part: "[T]he Laws of the United States...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Amendment V, U.S. Constitution, relevant part: "[N]or be deprived of life, liberty, or property, without due process of law..."

Amendment VII, U.S. Constitution, relevant part: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Amendment XIV, U.S. Constitution, relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

OCGA 9-15-14:
(This code section is reproduced in its entirety in Question #2)

STATEMENT

A. COURT RULINGS BELOW

The Supreme Court of Georgia denied Plaintiff a writ of certiorari on Case #S08C0965 May 19th, 2008 (App. infra, 1a).

This Court denied Plaintiff a writ of certiorari on the original body of the case #07-1071 on March 31st, 2008 (App. infra, 2a).

The Court of Appeals of Georgia denied Plaintiff's application for a discretionary appeal of an award of fees and costs pursuant to OCGA 9-15-14, Case #A08D0183 entered January 31st, 2008 (App. infra, 3a).

The Superior Court of Madison County Georgia awarded Defendants $5,943.84 in attorney's fees and costs pursuant to OCGA 9-15-14, Case #05-MV-977-H entered December 10th, 2007 (App. Infra, 4a). (This was due to The Court of Appeals of Georgia returning the remittitur to the trial court on the main body of the case, pursuant to their rule 39(b), before This Court had ruled on Certiorari.)

The Supreme Court of Georgia denied Plaintiff a writ of certiorari on the main body of the case, #S07C1399, on September 10th, 2007.

The Court of Appeals of Georgia delivered a 10 page written opinion on April 25th, 2007 (App. Infra, 14a) stating that Defendant Christopher Tamplin's "admissions by a party opponent" while under examination by Plaintiff on a prior case were hearsay; misrepresented the contents of Plaintiff's contract despite having a sworn copy in the record; used the dicta from a non-written, at-will employment contract (solicitation of employees by another company) common law case to hold that Defendants had not interfered with a written, notarized simple contract; held that Defendants were heirs-at-law to a grandmother's estate, when in Georgia only sons and daughters of a testator are heirs-at-law; held that threats to person and

property, about and during litigation, in order to intimidate a litigant, did not rise to the required level to trigger Intentional Infliction of Emotional Distress; completely disavowed circumstantial evidence that both Defendants were the only persons on the planet that knew the necessary information to orchestrate threats made by anonymous telephone callers.

The Superior Court of Madison County Georgia issued a one line ruling granting Defendant's motion for summary judgment on Case #05-MV-977-H was entered October 28th, 2006 (App. Infra, 23a). Trial court judge Hodges did not break the seals on Plaintiff's deposition despite signing a defendant proffered order stating he reviewed all admissible items of record. The Georgia appellate court's have consistently held that not examining the evidence presented on summary judgment by not opening a deposition is not a violation they will remedy on appeal.

B. FACTS OF THE CASE

This is a writ of certiorari to The Superior Court of Madison County Georgia. In the trial court below, Plaintiff made numerous constitutional objections to the way in which an award of attorney's fees and costs is handled pursuant to OCGA 9-15-14. Plaintiff also requested a jury trial pursuant to the 7th Amendment and this Court's holding in Gideon v. Wainwright on the facts of the case, as alleged in Defendants' motion, as he believes OCGA 9-15-14 as it has been interpreted by the state supreme court is not in fact a sanction, but is actually a tort damage.

All Plaintiff's objections were overruled and the motion for a jury trial was denied. The trial court, as finder of fact, awarded Defendants $5,943.84 in attorney's fees and costs.

Pursuant to OCGA 5-6-35(a)(10), Plaintiff made

application for a discretionary appeal to The Court of Appeals of Georgia. The Application was denied.

Plaintiff then filed a petition for a writ of certiorari to The Supreme Court of Georgia. The petition was denied May 19th, 2008.

The award of fees and costs, with constitutional objections, is now before this Court on a petition for writ of certiorari.

C. QUESTION #1

Does it violate the Due Process clause of the 14th Amendment for a trial court to hear, grant and issue a leviable *fieri fascias*, pursuant to an OCGA 9-15-14 motion for attorney's fees and costs--based on the supposition that a Plaintiff's legal positions are completely lacking in substance as to both law and fact--while the original body of the case has not yet been heard or denied certiorari by The Supreme Court of The United States.

Was the trial court's hearing of Defendants' motion for attorney's fees and costs, pursuant to OCGA 9-15-14, before the original body of the case was *res judicata [a thing decided]* by the Supreme Court of The United States erroneous?

As a practice outlined in its rules, The Court of Appeals of Georgia returns the remittitur to the trial court upon a final disposition of the case in the state supreme court. The Court of Appeals of Georgia does not wait for the issue of certiorari to be settled at The Supreme Court of the United States. This practice allows a litigant to file a motion and collect damages pursuant to OCGA 9-15-14 before The Supreme Court of the United States has had the last say on the original body of the case, before the original body of the case is *res judicata*.

Regarding the issue of *res judicata* and a petition for

certiorari to the U.S. Supreme Court:

> It is the general rule that a judgment sought to be used as a basis for the application of the doctrine of res judicata must be a final judgment. 46 AmJur2d 626, Judgments, 457; Annot. 9 ALR2d 984. In Georgia a judgment is suspended when an appeal is entered within the time allowed. Code 110-303. And the judgment is not final as long as there is a right to appellate review. Chlupacek v. Chlupacek, 226 Ga. 520 (3) (175 SE2d 834). As the first trial in the instant case is not final it cannot act as res judicata because res judicata is a bar to subsequent action between the same parties seeking similar relief. Salter v. Heys, 207 Ga. 591, 593 (63 SE2d 376); Walker v. Hamilton, 210 Ga. 155 (2) (78 SE2d 511).

LEXINGTON DEVELOPERS, INC. v. O'NEAL CONSTRUCTION COMPANY, INC., 54272 (143 Ga. App. 440) (238 SE2d 770) (1977).

"[T]he judgment was not final"; Plaintiff's "right to appellate review" was still available when the trial court held a hearing on November 17th. 2007 pursuant to Defendants' motion for attorney's fees and costs. Plaintiff did ultimately exercise his "right to appellate review" before The Supreme Court of The United States in a petition for certiorari, Case #07-1071.

Is this practice by The Court of Appeals of Georgia violative of the Due Process clause of the 14th Amendment? If not, why don't they simply return the remittitur to the trial court before the state supreme court has an opportunity to rule on the main body of the case as well?

The practice was objected to at pages 9 to 13 of November 17th, 2007 hearing transcript. An excerpt of those pages and the objection are included in Question #2

below. Plaintiff maintained the objection he had raised in the trial court in error #1 in his application for discretionary appeal to The Court of Appeals of Georgia:

> *1. The trial court's hearing of Defendants' motion for attorney's fees and costs before the case was res judicata [a thing decided] by the Supreme Court of The United States was erroneous.*

Plaintiff timely served Georgia's Attorney General with a copy of the filing in The Court of Appeals of Georgia.

Plaintiff maintained his objection in the same Error #1 in his petition for certiorari to The Supreme Court of Georgia. Again, Georgia's Attorney General was timely served with a copy of the filing in The Supreme Court of Georgia.

D. QUESTION #2

Does any part of the way in which the state of Georgia handles the assessment of attorney's fees and costs, and the subsequent discretionary only appeal, pursuant to OCGA 9-15-14, violate The Constitution of the United States, or any of its amendments, more specifically the 5th, 7th and 14th amendments.

"Usually when he came by the Lester place with turnips or sweet potatoes, or for that matter with any kind of food, he left the road half a mile from the house and made a wide circle through the fields, returning to the road a safe distance beyond." *Page 1, paragraph 4, Erskine Caldwell's* Tobacco Road *(1932).*

Does this statement adequately describe the judicial system in the state of Georgia? Thieving? Corrupt? So corrupt in fact that one must leave the road a half mile from their house and only return to it "a safe distance beyond." A great many lawyers in Georgia would argue

that it does. And the politicians claim there is nothing they can do about it.

Has it become this way due to the English custom of Summary Judgment and other ploys to end-run the seventh amendment and Trial by Jury? Perhaps.

The first time I encountered rumors of "the Lesters" was in the office of a trial lawyer who had practiced litigation in Georgia for 40 years, since the late 1960's. He told of a Probate case, a will, where he had won caveat in a jury trial only to have it overturned by the Georgia Supreme Court for insufficiency of evidence. And yet he claimed the record was replete with evidence. I wrote it off, thinking that surely he must have been wrong, that surely he must have misunderstood the law. Yet I did bear in mind that the will in question was worth $11,000,000, left the wife nothing, the 18 year-old girlfriend the entire pot of gold at the end of the rainbow.

Were things beginning to sound a bit *Tobacco Roadish*?

I relatively soon thereafter experienced summary judgment on my own will case, even though the record was replete with evidence.

It seems that misrepresenting the record is at least one way for an appellate court to swindle a case. I have experienced at least two others: simply claiming that the plain language of the law or the plain language of a case does not say what it says; and, comparing rotten apples to Florida Oranges, citing a losing case that is, on a factual basis, totally distinguishable from the case at bar. The Court may see all three in this case before it.

Now, before the Court would simply write me off as some *pro se* litigant who doesn't know the law, I argued 9 cases--traffic, magistrate (small claims), superior--over the course of 25 years in Miami and won them all, 100%. In 5 years in Georgia, I have lost 6 cases, 18 court appearances trial and appellate, upwards of 90 arguments, lost them

all, 100%.

Did I suddenly become deaf, dumb and blind upon crossing the border into Georgia. Not likely. Are the courts in Georgia simply incompetent? Not likely. They never made a single "mistake," of the 90 arguments, in my favor.

Now some lawyers, the ones more in the know, will tell you, off the record of course, that there is a conspiracy amongst the law clerks at the Georgia appellate courts to see that their frat buddies never lose a case. Given the evidence, it's quite plausible, almost impossible for the law clerks not to be involved in such a conspiracy, if one exists. But how could such a broad, comprehensive and blatant conspiracy be run without the knowledge of the judges and justices. It would seem nigh onto impossible, not plausible at all. (You can also see the same tinkering in high-profile, media-attention cases.)

Could the courts in Georgia simply be a venue for political beauty contests? This seems far more likely. I have had a very decent chap, a bankruptcy lawyer, tell me that he had ceased litigation in the Georgia courts and turned to bankruptcy law because he could never count on the law and the facts to see him through; the whole thing was strictly "political."

I heard through the grapevine that another lawyer simply remarked, "The tort laws have gone soft." Hearsay? Absolutely. But sometimes even hearsay is true.

Now I would not waste the Court's time and the above 9 paragraphs making an argument if I felt there was nothing to be gained from it. I hope to gain justice for myself and the other citizens of the state of Georgia. It is only through telling the truth about a problem that a person can find a true solution. The problem here in Georgia is corruption.

Now there is and has been, in the federal system, since 1791, a solution for corruption--even incompetence, even sheer bias, prejudice and bigotry (the political beauty

contest)--it is Trial by Jury as set forth in the 7th Amendment. Due to the aforesaid statewide corruption, is it not time to apply the 7th Amendment to the states via the 14th Amendment. In *GIDEON v. WAINWRIGHT, 372 U.S. 335 (1963)*, the 6th Amendment was applied to the states via the 14th. I really don't know how such a thing could hurt. It would simply give This Court a little more power to see that "the Lesters" of this world don't steal that 50 cent sack of turnips.

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Turning to the main body of the case at hand, it was before this Court on a petition for certiorari, case #07-1071 and was denied March 31st, 2008 (App. Infra 2a). Is the main body of the case still in this term of the court? Could it still be granted certiorari along with this portion of the case?

Regarding the aforementioned corruption and the main body of the case, the decision of the Court of Appeals of Georgia (App. Infra 14a-22a) is erroneous, and appears intentionally so, in more than a few places. It is necessary to get into the erroneous nature of the original case because Defendants can only prevail in an award of attorney's fees and costs when the underlying case is "frivolous."

Of first interest to this Court would be the fact that Defendants' counsel filed for summary judgment, Plaintiff filed a cross-motion within 30 days, specifically stipulating that the cross-motion was part of the response to the motion and yet Judge Hodges would not grant a less than 30 day continuance, for Defendants to respond to Plaintiff's motion, so both motions could be heard at the same time. Is this an end-run by the trial court in order to assist the Defendants in avoiding a possible summary judgment against them in the appellate court? You be the judge.

Also as is Judge Hodges' passion, he ultimately returned summary judgment against the Plaintiff, as he

did on all three cases before him, without breaking the seals on any of Plaintiff's depositions; and, without so much as one line of script concerning Findings of Fact or Conclusions of Law. Judge Hodges again, as is his custom, asked the litigants to prepare the order (App. Infra 23a-24a).

Does the practice of having counsel prepare a two line order for a case alleging three torts, Interference with Business Relations, Interference with Contractual Relations and Intentional or Negligent Infliction of Emotional Distress meet the burden of Due Process of law? Is a Findings of Fact and Conclusions of Law not in order? Does the trial court itself not have to find those facts and conclude that law? Could this Court make a ruling on such a practice?

Regarding section (1)(a) of the Court of Appeals of Georgia opinion (App. Infra 17a) and "is entirely hearsay in nature, is not subject to any hearsay exception, and is therefore inadmissible and non-probative," this holding falls under "simply claiming that the plain language of the law or the plain language of a case does not say what it says" mentioned above. Plaintiff examined Defendant Christopher Tamplin in the previous will case concerning the statements that Tamplin had made to the maker of the will. Under Georgia law, those statements were "fraud of any kind to the injury of the heirs at law." Those same statements also interfered with business relations, the completion of a novel, between Plaintiff and the maker of the will. Therefore any admission that defendant Tamplin made under examination in the probate court hearing incriminated him on the Interference with Business Relations tort. In his deposition, Plaintiff pointed directly to these admissions, and stated that he had heard them with his own ears. In one of his affidavits, Plaintiff used the transcript of the hearing to refresh his memory, according to the Georgia code, and swore to the admissions

he had heard Christopher Tamplin make. In support of this legal proposition, an "admission by a party-opponent," Plaintiff cited Black's Law Dictionary, the Federal Rules of Evidence and more than one Georgia common law case that all said the same thing: Christopher Tamplin's admissions in another court of law were not hearsay and could be used against him. Of course, the best way for a preferred party to win is if C.O.A.G. (for the sake of brevity) simply denies the law.

Regarding section (1)(b) of the opinion (App. Infra 18a) and "to pay Kirkland a larger portion of his father's estate," this is a misrepresentation of the record. The contract in question had 3 clauses. Only one of them had to do with "his father's estate." That clause was an agreement to remove the then current attorney, who was supposed to file the inheritance tax return, from his position. There were indications that a fraud might be perpetrated on the Internal Revenue Service by filing a fraudulent tax return. Plaintiff wanted no part of that and contracted with his mother to have said attorney removed. When the contract was interfered with, the attorney of course stayed in his place, and did whatever it was that he was about to do.

Another clause of the contract had my mother paying me $15,000 a year from her own finances, nothing to do with my father's estate , due to the fact that my disability is paid for from a private policy with a disreputable, in my opinion, insurance company that might terminate it without cause at any time. The $15,000 annually was to protect me against homelessness.

The final clause of the contract had to do solely with my mother's own $1,400,000 estate. To balance the 66.6% of my father's estate that my sister and nephew had acquired, my mother was to give me 66.6% of her estate for myself and my son; and the balance of 33.3% was to go to my niece, one of the other children who had not received a dime. I also lobbied for my other nephew, who has Downs

Syndrome, but both my parents had always steadfastly refused to give him a sixpence.

C.O.A.G. had a sworn copy of this contract attached to one of my affidavits, why did they choose to misrepresent it?

Also at section (1)(b) of the opinion (App. Infra 19a) C.O.A.G. quotes *Disaster Svcs. v. ERC Partnership,* 228 Ga. App. 739, 741-742 (492 SE2d 526) (1997): "constitut(ing] conduct wrongful in itself; thus, improper conduct means wrongful action that generally involves predatory tactics such as physical violence, fraud or misrepresentation, defamation, use of confidential information, abusive civil suits, and unwarranted criminal prosecutions." Any advocate of even average intelligence would realize immediately that this asininity couldn't possibly apply to a simple written contract. Requiring interference of this magnitude on a simple written contract would trigger a repugnancy to Due Process and/or Equal Protection. When I followed this quote to its original common law case, that case was about an unwritten at-will employment contract (one company acquiring employees from another)--thus the magnitude of the actions required to interfere with it. This is yet another example of C.O.A.G. "comparing rotten apples to Florida Oranges, citing a losing case that is, on a factual basis, totally distinguishable from the case at bar." All of the above was brought up on motion for reconsideration, even citing a common law case in which the dicta was correctly applied--to no avail of course.

Also at section (1)(b) of the opinion (App. Infra 19a) C.O.A.G. states: "Therefore, they had a bona fide economic interest in the agreement between the administrator of the estate and Kirkland as to amounts to be paid out from that estate." As pointed out above, the amounts to be paid out were not from my father's estate but were from my mother's. As can easily be seen on the sworn copy of the

contract that C.O.A.G. has in its possession, Mrs. Kirkland did not sign said contract as an administrator or executrix of the A. Leon Kirkland estate, but simply as herself. I also pointed out on motion for reconsideration that Christopher Tamplin and his wife were not heirs at law (Christopher's mother is still living), under Georgia Law, so they had no more interest in the 66% to me and 33% to my niece, from my mother's estate, "than the local humane society." (My niece was not a signor to the contract and gave no consideration, so this was not a legal avenue of approach for Defendants.)

These arguments too failed. Once the Georgia courts conduct whatever contest it is they conduct and decide you will lose, you will lose.

Also at section (2) of the opinion (App. Infra 20a) C.O.A.G. intimates that Tamplin's threat is just "a common vicissitude of ordinary life." This is disturbing. Apparently, judging from the handling of all Plaintiff's cases by the Georgia courts, anything that might happen on the tobacco road is just "a common vicissitude of ordinary life." Do these common vicissitudes include rape, murder?; maybe, if it's a family member. Given the entirety of the circumstances surrounding Christopher Tamplin's action, and the fact that it apparently carried a 5 year $50,000 fine [OCGA 16-11-37(d)] for threatening someone in the course of litigation, and the fact that other threats to person and property had been made, doesn't it make sense that Plaintiff's rights would be better protected if a jury, not a judge, decided just how outrageous, given the circumstances, this conduct might be. If this threat was delivered in the course of actions undertaken by Defendant Tamplin to breech Plaintiff's contract, does that not also make a difference?

Not in Georgia. Plaintiff even pointed to common law cases where the violation of criminal law was negligence per se and negligence per se of course supports Negligent

Infliction of Emotional Distress. Nothing was of any consequence. Not in Georgia. Plaintiff could not prevail.

Also at section (2) of the opinion (App. Infra 22a) C.O.A.G. states: "With regard to the phone calls, Kirkland admitted that he could not identify the callers, nor did he have any competent evidence that either of the two defendants arranged for the phone calls. Nor do these statements rise to the requisite level of outrageousness."

This is yet another example of "It seems that misrepresenting the record is at least one way for an appellate court to swindle a case." The record is replete (deposition and affidavit) with circumstantial evidence that, not only did Defendant Kelly Tamplin orchestrate these telephone threats, but she and Defendant Christopher Tamplin were the only people in the world who had the necessary knowledge to make the threats. Christopher Tamplin knew the evidence was in the trunk of Plaintiff's car. Christopher Tamplin was the only person in the world who had seen it other than the Plaintiff.

As an aside, I find it disturbing in this age of summary judgment decided "as a matter of law," that Circumstantial Evidence has been taken into the back room and strangled, as if a small child threatening to ascend the throne.

Juries almost always take into account the totality of the circumstances. I'm afraid, according to my own experience, that judges and justices do not. They have not sat through the trial on a hard chair; they do not likely even know what the totality of the circumstances are.

And of course, as usual, these threats designed to intimidate a litigant in a civil proceeding do not "rise to the requisite level of outrageousness." As you can see, nothing that happens on this tobacco road is outrageous.

At section (3) of the opinion (App. Infra 22a) C.O.A.G. denies Defendants' motions to dismiss and for sanctions for frivolous appeal.

As an aside, Defendants' counsel have made much light of Plaintiff suing his nephew and wife. If however the allegations of Plaintiff's cases are true, Plaintiff's nephew and wife have regaled his father with rumors of strippers, time squandered, lost fortunes, works of fiction at least as violent as Defendants' litigation tactics; have swindled a half million dollars from his father's will while no other grandchild received a sixpence; have threatened his person, his property, his reputation; and have interfered with and assisted in the breech of a contract worth $1,400,000.

What should one do in such a situation? Resort to violence? Threats? Sue 'em?

I sued 'em.

Would Defendants' counsel have me overcome 'em, with cuddles and love?

Unlike the related case in this court, Kirkland v. Kirkland, this case is about me, maybe my niece. Everybody doesn't have to live a *Tobacco Road* sort of life. We do. We had no choice in it.

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Regarding the final aspect of this case and Defendants being awarded $5,943.84 in attorney's fees and costs, OCGA 9-15-14 under which such award was made:

Title 9, Chapter 15, Section 14 (9-15-14)

(a) In any civil action in any court of record of this state, reasonable and necessary attorney's fees and expenses of litigation shall be awarded to any party against whom another party has asserted a claim, defense, or other position with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim,

defense, or other position. Attorney's fees and expenses so awarded shall be assessed against the party asserting such claim, defense, or other position, or against that party's attorney, or against both in such manner as is just.

(b) The court may assess reasonable and necessary attorney's fees and expenses of litigation in any civil action in any court of record if, upon the motion of any party or the court itself, it finds that an attorney or party brought or defended an action, or any part thereof, that lacked substantial justification or that the action, or any part thereof, was interposed for delay or harassment, or if it finds that an attorney or party unnecessarily expanded the proceeding by other improper conduct, including, but not limited to, abuses of discovery procedures available under Chapter 11 of this title, the "Georgia Civil Practice Act." As used in this Code section, "lacked substantial justification" means substantially frivolous, substantially groundless, or substantially vexatious.

(c) No attorney or party shall be assessed attorney's fees as to any claim or defense which the court determines was asserted by said attorney or party in a good faith attempt to establish a new theory of law in Georgia if such new theory of law is based on some recognized precedential or persuasive authority.

(d) Attorney's fees and expenses of litigation awarded under this Code section shall not exceed amounts which are reasonable and necessary for defending or asserting the rights of a party. Attorney's fees and expenses of litigation incurred in obtaining an order of court pursuant to this Code section may also be assessed by the court and included in its order.

(e) Attorney's fees and expenses under this Code section may be requested by motion at any time during the course of the action but not later than 45 days after the final disposition of the action.

(f) An award of reasonable and necessary attorney's fees or expenses of litigation under this Code section shall be determined by the court without a jury and shall be made by an order of court which shall constitute and be enforceable as a money judgment.

(g) Attorney's fees and expenses of litigation awarded under this Code section in a prior action between the same parties shall be treated as court costs with regard to the filing of any subsequent action.

(h) This Code section shall not apply to proceedings in magistrate courts. However, when a case is appealed from the magistrate court, the appellee may seek litigation expenses incurred below if the appeal lacks substantial justification.

So far, so good. OCGA 9-15-14 as passed by the Georgia General Assembly is a sanction and is apparently no different than Fed.R.Civ.P. 11. It is my recollection that sanctions are also available under rules 26 and 37.

On closer inspection however this law would appear to have some Due Process problems. First, OCGA 9-15-14 (e) allows for a motion to be filed up to "45 days" after a favorable, to the movant, disposition. A Notice of Appeal under Georgia law must however be filed within 30 days. It can easily be seen that the disposition of a motion under OCGA 9-15-14 will not be included in the main appeal of the case. A discretionary appeal must be taken under

OCGA 5-6-35(a)(10). It can easily be seen, as happened in this case, that the application for discretionary appeal may be denied and a petition for certiorari to the Supreme Court of Georgia may be denied. The movant who has won a judgment may take his *fieri fascias* and wipe the loser, his bank accounts and assets, from the face of the planet before the loser has access to any court.

Now it could be argued that the loser can get a stay of the judgment in each court along the way. But can he? Does a court who has not taken the case by granting the discretionary appeal or the petition for certiorari even have jurisdiction to grant a stay?

How is it that a litigant's property, his money that he needs to go forward with an appeal, may be confiscated at such a time as to keep him from even mounting an appeal. A litigant can be wiped out; even if the law is on his side; even if, according to the facts and the law, he is legally capable of winning the underlying case on appeal. In the case before This Court, Defendants had a judgment and *fieri fascias* in December 2007, 4 months before the main body of this case was even denied certiorari by this Court. Is this Due Process?

(The Federal Rules of Appellate Procedure handle this problem by extending the time to file a notice of appeal until 30 days after an order has been entered disposing of any motion for attorney's fees. The federal procedure is Due Process. The issue of attorney's fees may be taken up in the main appeal.)

Further, OCGA 9-15-14 (g) stops a Plaintiff, who has lost an award of fees and expenses, and cannot pay them, from ever bringing another action against that defendant. Under this scheme of law, my mother could now follow through on her threat to shoot me "between the eyes," and my estate could not bring a Wrongful Death action until such time as the original judgment owing her was paid.

Is this Due Process of Law?

(It seems to me that the remedy for Abusive Litigation is the tort of Abusive Litigation--not a scheme such as this.)

Further, according to the Supreme Court of Georgia in *BETALLIC, Inc. et. al. v. DEAVOURS et. al. 263 Ga. 796 (439 SE2d 643)*, OCGA 9-15-14 is not quite what it seems to be; it is not a clone of Fed.R.Civ.P. 11. In *BETALLIC,* The Supreme Court of Georgia held that the movant has up to 45 days after the disposition of the entire case to ask for attorney's fees on the entire case. See Justice Hunstein's dissent at page 798: "The reasonableness of this construction...."

Judge Ison also joined in the dissent.

Is this "New Law" passed from the bench by the Supreme Court of Georgia? Not only that, what originally looked like a sanction now looks like the tort of Abusive Litigation. See *YOST v. TOROK et al., 42789 (256 Ga. 92) (344 SE2d 414) (1986)* at page 95: "To define anew -- into a single cause of action..." wherein The Supreme Court of Georgia quotes the language of OCGA 9-15-14 in describing the tort of Abusive Litigation.

How can a judge now find facts on what is essentially the tort of Abusive Litigation when the Georgia constitution, Article I, Section I, Paragraph XI, requires a jury trial on every case unless the litigant waives such jury trial in writing, or on record in a hearing. See HOWARD *v. BANK SOUTH, 209 Ga.App. 407 (433 SE2d 625) (1993)* at page 410: "'The Constitution of Georgia as well as the Civil Practice Act....'" Affirmed by the Georgia Supreme Court as *BANK SOUTH, N.A. v. HOWARD, 264 Ga. 339 (444 SE2d 799).*

As an aside, attorneys fees and costs on a given case can run into hundreds of thousands, even millions of dollars. Did the Founding Fathers mean for a single individual, a judge, to have the power to bankrupt another individual? Does absolute power not have a corrupting

influence? Does anyone recall the utterances of Lord Acton? Is this absolute power to destroy not meant to be tempered by the 7th Amendment and the learned words "where the value in controversy shall exceed twenty dollars?"

I may be the nuttiest nut that fell off the tree but I think so.

It is for this reason that, in the hearing of November 17th, 2007, I moved the trial court for a jury trial on these issues. I believe that a jury is the only entity that can constitutionally deliver a verdict on damages pursuant to OCGA 9-15-14--as The Supreme Court of Georgia has held it to be in *BETALLIC* supra. Under the holding in *BETALLIC,* OCGA 9-15-14 is not a sanction; it is a tort, the tort of Abusive Litigation. Under both the 7th Amendment and Article I, Section I, Paragraph XI of the Georgia constitution, only a jury may award damages on a tort.

Also, for those not in the know, let me explain to you why defendant-type lawyers don't use the tort of Abusive Litigation versus OCGA 9-15-14. If a counterclaim is in fact filed, the plaintiff may indeed pull out of the case. This leaves defendant lawyers with no case to litigate, so they had rather string the unwary plaintiff along, making all the money they can in the process, then trap him in the end with OCGA 9-15-14. The Supreme Court of Georgia is very much aware of this, thus the holding in *BETALLIC* supra.

Further, OCGA 9-15-14, that began as a sanction, now looks curiously like the "loser pays" England Rule (the litigant can ask the judge for fees and costs for the entire case, as was done in this case). Why has the England Rule never been initiated in the federal courts of the United States? Attorney's fees have never been awarded against the loser for an entire case in the federal court system, except as a punitive damage paid by defendants in civil rights and certain other cases. See *HALL v. COLE, 412 U.S. 1,* at page 5 citing *NEWMAN, VAUGHAN, BELL* and

ROLAX. HALL itself is a labor rights case. *NEWMAN* is a civil rights case and *VAUGHAN* is a seaman's worker's compensation-type case. All are where Plaintiff's were awarded fees for a "punitive" damage as stated in *HALL.* Further, see *F.D. RICH CO. v. INDUSTRIAL LUMBER CO., 417 U.S. 116,* at page 129: "We have observed that 'one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate rights if the penalty for losing included the fees of their opponents' counsel.' Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967)."

Did my "penalty" for losing the case now before this Court (for reasons that seemed to have nothing to with the facts and the law) include "the fees of their opponents' counsel?" Is it this possibility of losing when one has not truly lost, when one has had a valid case and a valid cause, that makes an award of attorney's fees and cost, as it is done in Georgia, repugnant to due process as guaranteed by the 14th Amendment? Has the England Rule never been instituted in the federal court system because it is repugnant to due process of law for the reasons I have just stated, for the reasons stated in Fleishmann supra?

There are many reasons a litigant may lose his case: incompetent counsel, incompetent judge, incompetent appellate courts, corrupt judges, corrupt appellate courts, incompetent juries, biased, prejudiced, bigoted judges and/or juries; the list goes on.... Do all these possibilities for losing a case not make the England Rule repugnant to Due Process of Law? I am a mental incompetent, but I am no fool; I think so.

I think the England Rule is repugnant to Due Process; and I think OCGA 9-15-14, as it has been laid out by The Supreme Court of Georgia in *BETALLIC* supra (an award of fees for the entire case, by a judge, within 45 days of its disposition) is also repugnant to Due Process and

Trial by Jury--that is, if it is not simply repugnant to the U.S. constitution because it is not the law of the state of Georgia as passed by its General Assembly, because it is a "new law" passed from the bench of Georgia's state supreme court.

It is to the above that I objected in the November 19th 2007 hearing (pages 9 to 13) on attorney's fees and costs:

> THE COURT: Mr. Kirkland.
> MR. KIRKLAND: Your Honor, could I sit here while I argue? I have some physical problems. I might not be able to make it all the way through this if I have to stand.
> MR. HOLLINGSWORTH: I don't have any objection, Your Honor.
> THE COURT: All right. That's fine.
> MR. HOLLINGSWORTH: As long as the court reporter can hear him.
> THE COURT: I think he speaks plenty clearly.
> MR. KIRKLAND: First of all, I'd like to move for a continuance until the case has been decided by the U.S. Supreme Court. I have until December 9th to file a petition for certiorari. I had ninety days from the date that it was denied by the State Supreme Court. For me to spend my money, time and effort to defend against a motion for attorney's fees and costs before all appeals are exhausted and the case is *res judicata*, violates the due process of the Fourteenth amendment of the U.S. Constitution. I'm actually having money taken from my pocket to defend something before it has been decided. It's like suing someone before they've actually damaged you is what it amounts to. There has been no *res judicata* in this case. Once the U.S. Supreme Court denies
> (Page 9)

Cert., grants Cert., decides it, then it will be *res judicata* and they can go ahead and it won't be a due process violation. It also violates the equal protection clause of the Fourteenth Amendment because I believe it is contrary to the Georgia State law. Would you like to rule on the continuance, Your Honor?
THE COURT: I will listen to whatever you have to say, Mr. Kirkland
MR. KIRKLAND: So I take it that that's a no?
THE COURT: No. Since you're acting as your own counsel, you will have to make the decision about what you argue and what you present to the Court.
MR. KIRKLAND: Well, Your Honor, that was my argument. Are you willing to grant the continuance until it's actually tried by the U.S. Supreme Court?
THE COURT: No sir. Denied.
MR. HOLLINGSWORTH: Thank you, Judge.
MR. KIRKLAND: In the Court of Appeals Defendants filed a motion for sanctions and to dismiss under Rules 15 (b) and 41. Of course, 15 (b) is for frivolous appeal. They are allowed to go item by item in any of the errors or any of the issues presented in court and sanction for that amount. They're also allowed to dismiss the case on sanctions under Rule 41 because it's frivolous. They did neither. They denied that motion. That Court decided
(Page 10)
the issues against them and the issues of Rule 15(b) and 41 are exactly the same issues as OCGA 9-15-14(a) and (b). In order for anything that I argue to fall under 9-15-14(a) and (b), it has to fall under 15(b). So the questions of law and fact covered under 9-15-14(a) and (b) have already been decided against the Defendants by the Court of Appeals. They denied the motion. Do you have a question there, Your Honor?
THE COURT: No sir.

MR. KIRKLAND: They now ask this Court to redecide the issue, a second decision on the same issues violates the doctrine of *res judicata.* To violate the doctrine of *res judicata* is also a violation of due process under the Fourteenth Amendment, the due process clause of one time through on any single legal issue, not twice. It also violates the equal protection clause and I believe that is contrary to State law as well to decide an issue twice. What is the Court's ruling on that, Your Honor?
THE COURT: Denied because they are not seeking any fees or expenses for appellate work. They're only seeking fees and expenses for the defense of the lawsuit in this court.
MR. KIRKLAND: What I was saying, Your Honor, I'm aware of that, but all the issues that were argued in this court were also, since they were ruled against -- in
(Page 11)
other words, this Court ruled against the Plaintiff they were brought up in the errors, so anyone of those issues --
THE COURT: No sir. Those are two separate issues. Fees and expenses for appeal is different from fees and expenses for the trial court. I can't award fees and expenses for appeal and they can't award fees and expenses for work before the trial court. Those are two different issues; therefore, it's not *res judicata.* It doesn't settle anything.
MR. KIRKLAND: I'd also like to demand a jury trial on the issues. In Gideon v. Wainwriqht, 372 U.S. 335, Gideon argued the Sixth Amendment requiring representation by counsel in a criminal proceeding applied to the State via the due process clause of the Fourteenth Amendment. It goes without saying that if Gideon's argument was found to be true by the U.S.

Supreme Court, the Seventh Amendment requiring a trial by jury also applies to the State via the due process clause of the Fourteenth Amendment. A trial by jury was demanded at the outset of this case so for the trial court to now decide issues of fact regarding 9-14-15(a) and (b) is a violation of the U.S. Constitution. The issues of fact are as follows on OCGA 9-15-14(a), complete absence in facts. At some point along the way, the facts were
(Page 12)
reached of such a substantial place, they become a complete absence. It's definitely a jury issue. It's a graded approach to that. Also, what can be reasonably believed that a court would accept as asking what is reasonable. That's a fact as well. That's something that a jury would normally answer, what is reasonable. When you go to 9-15-14(b), substantial justification, the word substantial is definitely a jury issue. What constitutes substantial? There's a little bit more just like a complete absence and then at some point reads as substantial; so it is a fact. Improper conduct, that's also a fact. Substantially frivolous, there we go with substantially again. What constitutes substantially is an issue of fact. Basically, I would like a jury trial.
THE COURT: Motion for a jury trial is denied. The statute is very clear that this is an issue for the Court to determine.
MR. KIRKLAND: Your Honor, I'd like to swear in Mr. Hollingsworth.
MR. HOLLINGSWORTH: Would you like for me to take the stand, Mr. Kirkland?
MR. KIRKLAND: Well, it doesn't matter whichever he'd like.
MR. HOLLINGSWORTH: I'll be happy to.
(Page 13)(Note: this transcript of proceedings is

verbatim to the transcript of proceedings for Kirkland v. Kirkland also before this court on a petition for certiorari. For "purposes of judicial economy," the judge allowed Plaintiff to object once and then stipulated that the objection would become part of the record for both cases and was recorded as such by the court reporter.)

Plaintiff then attempted to examine Mr. Thomas F. Hollingsworth, III, counsel for the defendants, on the facts of the case as outlined in the Findings of Fact which he himself (the judge didn't prepare it) prepared. Judge Hodges however leaned over to the witness chair, very promptly at the outset of the examination, and suggested to Mr. Hollingsworth, III that he might want to object to any examination on the facts, the ones he had alleged in order to extract that certain sum of cash in fees and costs from the Plaintiff. Mr. Hollingsworth, III did in fact object. Judge Hodges promptly thereafter sustained his (to clarify, Mr. Hollingsworth, III's) objection.

How could Judge Hodges have anticipated such a thing?

Could it be that Judge Tice, another judge in The Northern Judicial Circuit, had told Judge Hodges of a quite harrowing experience in his own courtroom on another case wherein Plaintiff's pocket had been similarly picked for nigh onto $5000, wherein Plaintiff had eaten Mr. Hollingsworth, III alive, then flossed his teeth, while two other lawyers muttered under their breath in an attempt to distract Plaintiff, and a popinjay in the gallery whistled him on?

Apparently it's bad relations for the Georgia public to witness an Alabama clodhopper outlawyer a Georgia lawyer with a "III" after his name.

Unfortunately however I made insufficient constitutional objections prior to dining at Mr.

Hollingsworth, III's table, and that case is not before this court.

As an aside, the above may seem somewhat comical, as I have written it; it was not comical at all to experience.

The Plaintiff maintained the objections he had raised in the trial court in the following errors in his application for discretionary appeal to The Court of Appeals of Georgia:

1. The trial court's hearing of Defendants' motion for attorney's fees and costs before the case was res judicata [a thing decided] by the Supreme Court of The United States was erroneous.
2. The trial court's redeciding of the issue of whether any part of Plaintiff/Applicant's legal positions in the instant case constituted "a complete absence of any justiciable issue of law or fact," were "frivolous," or lacked "substantial justification"--issues already decided by The Court of Appeals in hearing Defendants' Rule 41 (c) Motion to Dismiss and Rule 15(b) motion for sanctions for frivolous appeal--violated the doctrine of res judicata and was erroneous.
3. The trial court's sitting as trier on fact on the consequential damages flowing from the tort of Abusive Litigation when the Plaintiff/Applicant had requested a jury trial was error.
4. The trial court's grant of attorney's fees and costs on the issue of the "Motion for Relief" was erroneous.
5. The trial court's grant of attorney's fees and costs on the issues of Defendants' extra-judicial admissions by a party opponent, Terroristic Threats made by Defendants, Plaintiff's consideration in the contract not valid, Defendants dropping of a motion to compel and Plaintiff's motion to transfer was erroneous.

Plaintiff timely served Georgia's Attorney General with a copy of the filing in The Court of Appeals of Georgia.

Plaintiff maintained his objections in the same five errors in his petition for certiorari to The Supreme Court of Georgia. Again, Georgia's Attorney General was timely served with a copy of the filing in The Supreme Court of Georgia.

Now, maybe the Plaintiff, being a mental incompetent and a totally untrained (formally) advocate of the law, and having an 11th grade education (the crucible of Geometry ruining any aspirations he had to higher learning), did not always raise his objections to the proceedings in the courts below in a completely clean and totally pristine manner. But he did object at all times to the outcome. And possibly such objections as he did make will be found to be sufficiently collateral to the actual issues to be considered as a part of the whole. In that vein, he asks that The Court grant him as much sidewise slip, leniency, as possible in these and all previous of his pleadings. See HAINES v. KERNER, 404 U. S. 519 (92 SC 594, 30 LE2d 652) (1972), wherein a party *pro se* is not required to plead all aspects of his case with laser-like, surgical precision.

E. OTHER RELIEF

Plaintiff/Petitioner also prays for such other and further relief as may be due and granted under the rules of this court and the laws of the United States.

REASONS FOR GRANTING THE PETITION

Justice.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Good day, and as always,
Respectfully submitted,

Dwain Lee Kirkland
Pro se
P.O.B. 773
Hull, GA. 30646
706.788.3158

August 2008

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE
ATLANTA

Date: May 19, 2008

Dwain Lee Kirkland
P.O. Box 773
Hull, GA 30646

Case No. S08C0965

DWAIN LEE KIRKLAND v. CHRISTOPHER K. TAMPLIN et al.

COURT OF APPEALS CASE NO. A08D0183 S08C0648 S08C0966

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Therese S. Barnes, Clerk

Supreme Court of the United States
Office of the Clerk
Washington, DC 20548-0001

William K. Suter
Clerk of the Court
(202) 479-3011

March 31, 2008

Mr. Dwain Lee Kirkland
P.O. Box 773
Hull, GA 30646

Re: Dwain Lee Kirkland
v. Christopher K. Tamplin, et al.
No. 07-1071

Dear Mr. Kirkland:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,
s/William K. Suter
William K. Suter, Clerk

Court of Appeals
of the State of Georgia

ATLANTA, JANUARY 31, 2008

The Court of Appeals hereby passes the following order:

APPLICATION NO. A08D0183

DWAIN LEE KIRKLAND V. CHRISTOPHER K. TAMPLIN ET AL

Upon consideration of the Application for Discretionary Appeal, it is ordered that it be hereby DENIED.

96016

O5MV977

(circular stamp: "Court of Appeals of the State of Georgia 1906")

Court of Appeals of the State of Georgia
Clerk's Office, Atlanta JAN 3 1 2008 (stamped)

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia
Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk,

s/William L. Martin, III

IN THE SUPERIOR COURT OF MADISON COUNTY
STATE OF GEORGIA

DWAIN LEE KIRKLAND,)
Plaintiff,)
vs.)
)
) CIVIL ACTION NO.: 05-MV-977-H
)
)
CHRISTOPHER K. TAMPLIN AND)
KELLEY TAMPLIN AND OTHERS,)
Defendants.

Filed in Office
2007 Dec 10 11:00 AM
Michelle H. Strickland
Clerk of Court
Madison, Georgia
2007-11453
(stamp)

ORDER

The Defendants' Motion for Attorney's Fees and Expenses of Litigation having come before this Court for hearing, and this Court having considered the filings of Plaintiff and Defendants and argument of the Plaintiff, as well as the argument of counsel for the Defendants, and having reviewed the entire record in this case, the Court hereby makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. Plaintiff commenced the above styled action on

November 14, 2005.

2. Plaintiff's Complaint alleges that the Plaintiff was entitled to a recovery against the Defendants as a result of alleged fraudulent conduct of Defendants, as a result of threats made by Defendants against Plaintiff and as a result of the Defendants interference in a contract between Plaintiff and Ruby Kirkland.

3. Plaintiff's allegation of fraud against the Defendants is based on alleged conduct in which Defendants made statements to the1ate Armon Leon Kirkland which resulted in Armon Leon Kirkland reducing the amount that would be devised to Plaintiff in Armon Leon Kirkland's estate.

4. Plaintiff's allegation of fraud against the Defendants is based solely on two statements which are: (1) "that scientology would take (Christopher K. Tamplin's] mother's money...", and (2) "Look at [Plaintiff], he is a Scientologist. He's got no girlfriend. He spends all his time and money on strippers, and his books are violent and will never sell." These statements were allegedly made by Defendant Christopher Tamplin and overheard by Sheila Meadow who then relayed them to the Plaintiff.

5. Plaintiff's allegation that he was injured as a result of threats made against him by Defendants is premised solely on the statement of "[w]hat goes around comes around. This will all come back to you one day," by Defendant Christopher Tamplin and two alleged telephone calls received by Plaintiff. Plaintiff has not identified the source of the two telephone calls and has testified that he did not recognize the voice of the caller in his Deposition.

6. Plaintiff's allegation that Defendants breached, or tortiously interfered with, a contract relates to an alleged contract between Plaintiff and Ruby Kirkland. The subject matter of the alleged contract stated that Ruby Kirkland would pay certain sums of money to Plaintiff in exchange for Plaintiff's cessation of his challenges to the probate of the estate of the late Armon Leon Kirkland.

7. Plaintiff did not cease his challenges to the probate of the will of the late Armon Leon Kirkland, pursuing the caveat until certiorari was denied by the United States Supreme Court.

8. Plaintiff's caveat of the will of the late Armon Leon Kirkland was summarily dismissed by the Probate Court of Madison County and the Superior Court of Madison County, was denied by the Georgia Supreme Court and had Certiorari denied by the United States Supreme Court.

9. Plaintiff's caveat to the will of the late Armon Leon Kirkland lacked any legal merit.

10. There is no evidence of improper action or wrongful conduct by the Defendants with respect to Defendants interaction with Ruby Kirkland and the alleged contract between Plaintiff and Ruby Kirkland.

11. The Defendants were privileged in their communications with Ruby Kirkland with respect to the alleged contract between Ruby Kirkland and Plaintiff.

12. There is no evidence that the Defendants acted purposely and with malice with the intent to injure

Plaintiff in their interactions with Ruby Kirkland with respect to the alleged contract between Ruby Kirkland and Plaintiff.

13. There is no evidence that the Defendants induced a breach of contractual obligations or caused Ruby Kirkland to discontinue or fail to enter into an anticipated business relationship with the Plaintiff.

14. There is no evidence that any alleged tortious conduct of Defendants proximately caused damage to the Plaintiff with respect to the alleged contract between Plaintiff and Ruby Kirkland.

15. Defendants properly noticed the deposition of the Plaintiff on November 29, 2005.

16. Plaintiff objected to and sought a protective order with regard to his deposition on the basis that the office of Defendants' counsel was an improper location for the conduct of Plaintiff's deposition.

17. Plaintiff was aware of the county of residence of each of the Defendants on February 28, 2006.

18. Plaintiff moved to transfer this action against one of the two Defendants, Kelley Tamplin, to Franklin County, Georgia on November 2, 2006.

19. Plaintiff filed a motion entitled "Motion for Relief" on or about May 5, 2006, in which Plaintiff, appearing pro se, sought the right to retain counsel while continuing to represent himself.

20. Plaintiff moved to recuse the Honorable Thomas L. Hodges, on or about January 2, 2007.

21. The only allegation made in support of the motion to recuse Judge Hodges was that in a previous hearing in another case, Judge Hodges stated "Mr. Dwain Kirkland has filed a caveat which I assume was decided against him in the probate court and he has now filed an appeal to this court."

22. Defendants were forced to respond to Plaintiff's Complaint, to pursue a motion to compel discovery, to respond to Plaintiff's motion to transfer Defendant Kelley Tamplin to Franklin County, to respond to Plaintiff's Motion for Relief and to respond to Plaintiff's Motion to Recuse Judge Hodges.

23. Defendants incurred $5,915.00 in attorney's fees and $28.03 in expenses for a total of $5,943.84 in defense of the above styled action in the Superior Court of Madison County.

Conclusions of Law

1. Plaintiff's Complaint presented no justiciable issue of law or fact in this case.

2. Plaintiff's allegation of fraud against the Defendants was plainly unsupported by evidence and law and did not satisfy the requirements of O.C.G.A. § 51-6-1, et. seq. and presented no justiciable issue of law or fact.

3. Plaintiffs allegation that he was injured as a result of threats made by Defendants was plainly unsupported by evidence and law and presented no justiciable issue of law or fact. Plaintiff based his claim solely on a statement by

Defendant Christopher Tamplin which was,

as a matter of law, insufficient to support a cause of action. Plaintiff further based his claim on telephone calls which he attributed to Defendant Kelley Tamplin with no evidence to support such an allegation.

4. Plaintiff's allegation that Defendants breached, or tortiously interfered with, a contract between Plaintiff and Ruby Kirkland was plainly unsupported by evidence and law and presented no justiciable issue of law or fact. Plaintiff bases his claim on a contract for which he offered no consideration, and for which Plaintiff did not, in any way, perform. Plaintiff has also offered no evidence to support the elements of a tortious interference with contractual relations claim. Plaintiff has introduced no evidence that shows (1) improper action or wrongful conduct by the Defendants without privilege, (2) the Defendants acted purposely and with malice with the intent to injure, (3) the Defendants induced a breach of contractual obligations or caused a party or third parties to discontinue or fail to enter into an anticipated business relationship with the Plaintiff, and (4) the Defendants' tortious conduct proximately caused damage to the Plaintiff.

5. Alternatively, Plaintiff's commencement of this action and the three causes of action alleged therein lacked substantial justification and was substantially frivolous.

6. Plaintiff's prosecution of this action against the Defendants for the causes of action alleged were interposed for harassment of Defendants who are Plaintiff's nephew and nephew's wife.

7. Plaintiff's objection and motion seeking that this Court enter a protective order with respect to the location of Plaintiffs deposition lacked substantial justification as the proposed location stated in the properly served notice of deposition was within the limits of O.C.G.A. § 9~11-45(b).

8. Plaintiff's objection and motion seeking that this Court enter a protective order with respect to the location of Plaintiff's deposition was filed as a means of prolonging the litigation of this action and was filed by Plaintiff with the purpose of delay and harassment.

9. Plaintiff's objection and motion seeking that this Court enter a protective order with respect to the location of Plaintiff's deposition unnecessarily expanded this proceeding and constituted an abuse of discovery procedures available under the Georgia Civil Practice Act.

10. Plaintiff's motion to transfer the venue of this action with respect to Defendant Kelley Tamplin lacked substantial justification, was filed as a means of prolonging the litigation of this action, was filed with the purpose of delay and harassment and unnecessarily expanded this proceeding.

11. Plaintiff's "Motion for Relief" lacked substantial justification as Ga. Const. Art. 1, § 1, paragraph 12, does not permit a party to retain counsel and continue to proceed pro se.

12. Plaintiff's "Motion for Relief" was filed as a means of prolonging the litigation of this action, was filed by Plaintiff with the purpose of delay and harassment and unnecessarily expanded this proceeding.

13. Plaintiff's motion to recuse the Honorable Thomas L. Hodges lacked substantial justification as it failed to satisfy the requirements of Uniform Superior Court Rule 25 and Georgia law. Plaintiff failed to present any valid basis for recusal and such motions was substantially frivolous.

14. Plaintiff's motion to recuse the Honorable Thomas L. Hodges was filed as a means of prolonging the litigation of this action, was filed by Plaintiff with the purpose of delay and harassment and unnecessarily expended this proceeding.

15. Defendants have presented sufficient evidence to prove the actual attorney's fees and expenses of litigation rendered in this action and the reasonableness thereof.

16. Plaintiff offered no evidence contradicting the actual attorney's fees and expenses of litigation rendered in this action and offered no evidence contradicting the reasonableness thereof .

17. The attorney's fees and expenses of litigation rendered by Defendants were necessary in the defense of this action, and were necessary to respond to Plaintiff's Complaint, to pursue a motion to compel discovery, to respond to Plaintiff's motion to transfer Defendant Kelley Tamplin to Franklin County, to respond to Plaintiff's Motion for Relief and to respond to Plaintiff's Motion to Recuse Judge Hodges.

Based on the above Findings of Fact and Conclusions

of Law,

IT IS HEREBY ORDERED AND ADJUDGED that Defendants are entitled to an award of their reasonable attorney's fees and expenses of litigation pursuant to O.C.G.A. § 9-15-14(a) or, in the alternative, O.C.G.A. § 9-15-14(b) in the amount of $5,915.00 in attorney's fees and $28.03 in expenses for a total of $5,943.84. Any Finding of Fact which could be considered a Conclusion of Law, and any Conclusion of Law which could be considered a Finding of Fact, is hereby deemed to be such.

SO ORDERED 4th day of December 2007.

s/Thomas L. Hodges, III

Honorable Thomas L. Hodges
Judge
Superior Court of Madison County, Georgia

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

ATLANTA

Date: September 10, 2007

Dwain Lee Kirkland
P.O. Box 773
Hull, GA 30646

Case No. S07C1399

DWAIN LEE KIRKLAND v. CHRISTOPHER K. TAMPLIN et al.

COURT OF APPEALS CASE NO. A07A1225 S07C1519 S07C1385

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Therese S. Barnes, Clerk

THIRD DIVISION
BLACKBURN, P. J.,
RUFFIN and BERNES, JJ.

NOTICE: Motions for reconsideration must be physically received in our clerk's office within ten days of the date of decision to be deemed timely filed. (Court of Appeals Rules 4 and 37, September 5,2002)
http://www.gaappeals.us/rules/

April 25, 2007

In the Court of Appeals of Georgia

A07A1225. KIRKLAND v. TAMPLIN et al. BL-062

BLACKBURN, Presiding Judge.

Plaintiff Dwain Lee Kirkland appeals the summary judgment granted to defendants Christopher and Kelley Tamplin on Kirkland's three claims against these defendants. As to the two claims for tortious interference, we hold that Kirkland failed to present competent evidence of the element of improper means. As to the claim for intentional infliction of emotional distress, we hold that defendants' alleged
conduct was not extreme and outrageous. Accordingly, we affirm.

Summary judgment is only proper when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. OCGA § 9-11-56 (c). A de novo standard of review applies to an appeal from a grant of summary judgment,

and we view the evidence, and all reasonable conclusions and inferences drawn from it, in the light most favorable to the nonmovant. *Matjoulis v. Integon Gen. Ins. Corp.*[1]

So viewed, the evidence shows that Kirkland filed a complaint against his nephew Christopher and against Christopher's wife Kelley, in which he set forth three claims. The first claim alleged that Christopher had tortiously interfered with Kirkland's business relations with Kirkland's father before the father's death when (a) Christopher falsely told Kirkland's father (Christopher's grandfather) that Kirkland had introduced Christopher's mother (Kirkland's sister) to Scientology and that this religion was going to take her money, and (b) Christopher falsely told
Kirkland's father that Kirkland had no girlfriend, that Kirkland spent all his time and money on strippers, and that Kirkland had written a book that would never sell because it was so violent. Kirkland alleged that these fraudulent comments damaged the business relationship between himself and his father, causing the father to renege on some financial commitments to assist Kirkland.[2]

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[1] *Matjoulis v. Integon Gen. Ins. Corp.*, 226 Ga. App. 459 (1) (486 SE2d 684) (1997).

[2] Kirkland emphasizes in his appellate reply brief that this claim is a tortious interference claim, not simply a fraud claim.

The second claim alleged that Christopher and Kelley interfered with a settlement agreement between

Kirkland and Kirkland's mother, in which the mother had agreed to pay Kirkland increased monies from the estate of Kirkland's father. Kirkland maintained that Christopher and Kelley persuaded the mother to breach that contract by not paying the money.

The third claim alleged that Christopher and Kelley intentionally inflicted emotional distress upon Kirkland when (a) Christopher had told Kirkland, "What goes around comes around" and "This will all come back to you one day," while discussing Kirkland's actions in getting the mother to agree to the estate payments, and (b) two separate callers (whom Kirkland could not identify) phoned Kirkland and informed him that he should remove papers from his car if he did not want them stolen and that Kirkland's psychological and criminal records had been filed with the probate court overseeing the administration of his late father's estate. Christopher and Kelley moved for summary judgment on all claims, and when responding to that motion, Kirkland himself also moved for summary judgment in his favor on all claims. The court granted defendant's motion for summary judgment in its entirety, making it unnecessary to address Kirkland's motion. Kirkland appeals,

claiming the court erred in granting summary judgment to the defendants as to his three claims.

1. *Tortious Interference Claims.* Kirkland's first two claims assert tortious interference with business relations and with contractual relations. We hold that the undisputed evidence shows that Kirkland cannot prove an essential element of these claims.

> Tortious interference claims, whether asserting interference with contractual relations, business relations, or potential business relations, share certain common essential elements: (1) improper action or wrongful conduct by the defendant without privilege; (2) the defendant acted purposely and with malice with the intent to injure; (3) the defendant induced a breach of contractual obligations or caused a party or third parties to discontinue or fail to enter into an anticipated business relationship with the plaintiff; and (4) the defendant's tortious conduct proximately caused damage to the plaintiff.

Disaster Svcs. v. ERC Partnership.[3] See *The Boeing Co. v. Blane Intl. Group.*[4]

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[3] *Disaster Svcs. v. ERC Partnership,* 228 Ga. App. 739, 740 (492 SE2d 526) (1997).

[4] *The Boeing Co. v. Blane Intl. Group,* 276 Ga. App. 672, 675 (1) (624 SE2d 227) (2005).

(4)

(a) Tortious Interference with Business Relations. The first claim, which alleges tortious interference with Kirkland's business relations with his father, fails for the simple reason that Kirkland's evidence of Christopher's alleged fraudulent comments to the father is entirely hearsay in nature, is not subject to any hearsay exception, and is therefore inadmissible and non-probative. "In summary judgment proceedings[,] the rules on admissibility of evidence apply, and hearsay has no probative value unless it is part of the res gestae or otherwise admissible." *Hodges v. Putzel Electric*

Contractors.[5]

The only evidence Kirkland submitted to support his allegation that Christopher made fraudulent comments to Kirkland's father about Scientology and that Christopher made fraudulent comments about Kirkland's personal life and habits was Kirkland's testimony that his sister had recounted these comments to Kirkland. Indeed, this evidence appears to be double hearsay, since there is no evidence that the sister was even present when Christopher allegedly made these comments to the father. In any case, "self-serving hearsay. . . has no probative value on summary

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[5] *Hodges v. Putzel Electric Contractors,* 260 Ga. App. 590, 594 (1) (580 SE2d 243) (2003).

judgment." *Adams v. Gay.*[6] Christopher's bare acknowledgment to Kirkland that he had discussed Scientology with the father is hardly grounds from which to infer that those comments were in any way fraudulent. Absent evidence of fraud, Kirkland could not show that Christopher's actions were improper, an essential element of an action for tortious interference. See *Sommers Co. v. Moore.*[7] Because the only evidence of the allegedly wrongful actions was inadmissible hearsay,[8] the trial court did not err in granting summary judgment on this claim.

(b) *Tortious Interference with Contractual Relations.* The second tortuous interference claim alleges that Christopher and Kelley persuaded Kirkland's mother to breach a settlement agreement to pay Kirkland a larger portion of his father's estate. Once again, the element of improper conduct is missing from this tort. "[P]laintiff must show more than that the defendant simply persuaded

a person to break a contract. *Sommers Co.* [, supra, 275 Ga. App. at 605-606]; *Architectural Mfg.*

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[6] *Adams v. Gay,* 270 Ga. App. 65, 66 (1) (606 SE2d 26) (2004).

[7] *Sommers Co. v. Moore,* 275 Ga. App. 604, 605-606 (621 SE2d 789) (2005).

[8] In an affidavit, Christopher expressly denied making any statements to Kirkland's father about Kirkland's personal life or habits.

Co. v. Airotec, Inc.[9]" *Coloplast Corp. v. American Breast Care, L.P.*[10] Indeed, the plaintiff must adduce evidence of "improper action or wrongful conduct," which our courts have defined as "' constitut(ing] conduct wrongful in itself; thus, improper conduct means wrongful action that generally involves predatory tactics such as physical violence, fraud or misrepresentation, defamation, use of confidential information, abusive civil suits, and unwarranted criminal prosecutions.'" *Sommers,* supra, 275 Ga. App. at 606 (quoting *Disaster Svcs.,* supra, 228 Ga. App. at 741-742.) Here, we have only the bare evidence that Christopher and Kelley persuaded Kirkland's mother to breach the contract, which alone is insufficient to show tortious interference.

Moreover, as the grandson of Kirkland' s father, Christopher and his wife stood to inherit from the grandfather's estate. Therefore, they had a bona fide economic interest in the agreement between the administrator of the estate and Kirkland as to amounts to be paid out from that estate. Where the defendant has "a

bona fide economic interest in the contract or relationship with one of the parties to the

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[9] *Architectural Mfg. Co. v. Airotec, Inc.*, 119 Ga. App. 245, 249 (1) (166 SE2d 744) (1969).

[10] *Coloplast Corp. v. American Breast Care, L. P.*, 2006 U. S. App. LEXIS 30863 (11th. Cir. 2006).

contract," he is not a stranger to the contract and acts with privilege with regard to that contract. *Disaster Svcs.*, supra, 228 Ga. App. at 741. Because one of the essential elements of tortious interference is a showing that the defendant was acting without privilege, this is a second reason why the trial court correctly granted summary judgment to the defendants here. See *LaSonde v. Chase Mortgage Co.*[11]

2. *Intentional Infliction of Emotional Distress.* Kirkland's remaining claim is that Christopher and Kelley maliciously inflicted emotional distress upon him when (a) Christopher told Kirkland in a "murderous tone" that "[w]hat goes around comes around" and that "[t]his will all come back to you one day," which all related to Kirkland's efforts to have his mother pay him more from the estate, and (b) two unidentified callers phoned Kirkland and informed him that he should remove his litigation materials from his car to prevent their theft and that the probate court had received his criminal and psychological records. To prove an action for intentional infliction of emotional distress, "a plaintiff must demonstrate that: (1) the conduct giving rise to the claim was intentional or reckless; (2) the conduct was extreme and outrageous; (3) the conduct caused

[11] *LaSonde v. Chase Mortgage Co.*, 259 Ga. App. 772, 773 (1) (577 SE2d 822) (2003).

emotional distress; and (4) the emotional distress was severe." *Frank v. Fleet Finance, Inc. of Ga.*[12] Significantly, the defendant's conduct "must be so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." (Punctuation omitted.) *Martin v. North American Van Lines.*[13] "'Whether a claim rises to the requisite level of outrageousness and egregiousness to sustain a claim for intentional infliction of emotional distress is a question of law.'" *Frank,* supra, 238 Ga. App. at 318.

Under these standards, Kirkland's two allegations of intentional infliction of emotional distress fail. With regard to the statements that "[w]hat goes around comes around" and that "[t]his will all come back to you one day," we hold as a matter of law that such statements do not rise to the requisite level of outrageousness and egregiousness to sustain a claim for intentional infliction of emotional distress. Such common expressions from family members, though given in a threatening tone of voice, are generally considered a common vicissitude of ordinary life and are certainly not "'so outrageous in character, and so extreme in degree, as to go beyond

[12] *Frank v. Fleet Finance, Inc. of Ga.*, 238 Ga. App. 316, 318 (518 SE2d 717) (1999).

[13] *Martin v. North American Van Lines,* 226 Ga. App. 187,

190 (2) (c) (485 SE2d 815) (1997).

all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" *Jarrard v. United Parcel SVC.*[14] With regard to the phone calls, Kirkland admitted that he could not identify the callers, nor did he have any competent evidence that either of the two defendants arranged for the phone calls. Nor do these statements rise to the requisite level of outrageousness.

Accordingly, the trial court did not err in granting summary judgment on the intentional- infliction-of-emotional-distress claim.

3. We exercise our discretion to deny defendants' two motions for sanctions.

Judgment affirmed. Ruffin and Bernes, JJ., concur.

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[14] *Jarrard v. United Parcel Svc.*, 242 Ga. App. 58, 59 (529 SE2d 144) (2000).

IN THE SUPERIOR COURT OF MADISON COUNTY
STATE OF GEORGIA

DWAIN LEE KIRKLAND,)

Plaintiff,
vs.)CIVIL ACTION NO.:
05-MV-977-H

CHRISTOPHER K. TAMPLIN AND
KELLEY TAMPLIN AND OTHERS,

Defendants.)

FINAL ORDER

The Defendants' Motion for Summary Judgment having come before this Court, and the Court having reviewed the parties' briefs and all admissible matters of record in this action, and having heard oral argument from counsel for Defendants and from Plaintiff, pro se;

The Court finds that there exists no genuine issue as to any material fact in this case, and

IT IS HEREBY ORDERED that Defendants' Motion for Summary Judgment is granted.

SO ORDERED this 28th day of December, 2006.

(signed)

The Honorable Thomas L. Hodges
Judge, Superior Court

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CLERK OF COURT

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